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Residency for Election Purposes

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This paper is geared toward residency issues brought before county boards of elections and thus is addressed primarily to county boards. However, it is useful to the general public, also.

In the North Carolina Constitution (Section VI, § 2), it is required that one be a resident of the State and the electoral district in which one votes. The term, "residence," as used in our constitution, is synonymous with "domicile." [Hall v. Wake County Bd. Of Elections, 280 NC 600, 187 SE2d 52 (1972)]

Residence and domicile are not interchangeable terms. A person may have an actual abode (residence) in one place, and his permanent established home (domicile) in another. A domicile is the place to which the person intends to return. The law requires all persons to have only one domicile for voting purposes.

A person has domicile for voting purposes at a given place if he or she 1) has abandoned his or her prior home and is residing elsewhere; 2) has a present intention to make that place his or her home, and 3) has no intention presently to leave that place. Lloyd v. Babb, 296 NC 416, 251 SE2d 843 (1979).

"…The presumption of law being that the domicile of origin subsists until a change of domicile is proved, the onus of proving the change is on the party alleging it, and the onus is not discharged by merely proving residence in another place, which is not inconsistent with an intention to return to the original domicile." Reynolds v. Lloyd Cotton Mills, 177 N.C. 412 (1919)

To establish a change in domicile, a person must show (Farnsworth v. Jones, 112 N.C. App 182, 187 (1994):

1) an actual abandonment of the first domicile, coupled with an intention not to return to it;
2) the acquisition of a new domicile by actual residence; and
3) the intent of making the newer residence a permanent home.

The domicile test for determining where citizens may vote dominates the election laws of most states. See William H. Danne, Jr., Annotation, Residence of Students for Voting Purposes, 44 A.L.R.3d 797, § 2 (1972) (observing that "it is a matter of virtually uniform recognition" that, where state constitutional and statutory provisions limit the right to vote to the residents of a given geographical area, "the term 'residence' should be equated with the concept of domicile"); Restatement (Second) of Conflict of Laws § 11(1) cmt. k (1989) (noting that "residence" is generally interpreted as being the equivalent of "domicile" when used in state statutes relating to voting).

There is erroneous belief that persons who own property in a municipality or county or pays property tax to a municipality or county have the right to register and vote in that municipality or county, without establishing that location as their permanent residence. Using domicile as the legal guideline for voter registration informs potential voters where they may vote, a vital function that encourages registration and voting. Moreover, it gives voters the notice required for the enforcement of criminal laws against individuals voting in places where they are not eligible.

The residency qualifications to register to vote in a municipality or county is that the person registering must have resided, by the time of the election, in that municipality or county for at least 30 days with the intent to make that county, municipality, precinct, ward, or other election district a permanent place of abode. Thus, the domicile rule provides substantially workable standards for county boards as to whether would-be voters are or are not entitled to register.

A key element in determining residency for voting is contained in the NC General Statutes G.S. 163-57 (3). It states; “A person shall not be considered to have gained a residence in any county, municipality, precinct, ward, or other election district of this State, into which that person comes for temporary purposes only, without the intention of making that county, municipality, precinct, ward, or other election district a permanent place of abode.”

Staff of the North Carolina State Board of Elections offers the following general opinion: “A person may have an actual abode (residence) in one place, and their permanent established home (domicile) in another. A domicile is the place to which the person intends to return. The law requires all persons to have only one domicile for voting purposes.”

A person desiring to register to vote or make changes to an existing voter registration record may do so by completing a North Carolina Voter Registration Application/Update Form. Upon completion of the form, the voter is required to sign and date an attestation, under penalty of perjury, which states in part; “I shall have been a resident of North Carolina, this county, precinct, or other election district for 30 days before the next election in which I intend to vote.” The application further states: “Warning: If you sign this card and know it to be false, you can be convicted of a Class I felony.”

A temporary change of voter registration in order to qualify to vote in a municipality or county where the voter has no intent to make his permanent home could create serious legal issues for the voter not only as to voting, but as to taxation and schooling for any minor children.

RESIDENCY DISPUTE

The question of one's domicile is a question of fact, which depends upon the circumstances of each individual's case. That is, each applicant's eligibility to register to vote at a location should be determined individually. A student can be domiciled at the location of his or her college if it is the intent of that student not to return to his or her former home and regards the college locale as "home". See Baker v. Varser, 240 NC 260, 82 SE2d 90 (1954). However, there is a legal presumption that a student who leaves for college is not domiciled in the college town to which he goes. This is a rebuttable presumption; that is, it can be overcome by the greater weight of the evidence.

To legally change a domicile, there must be an actual abandonment of the first domicile with the intent not to return to it, and the acquisition of a new domicile by actual residence at another place with the intent to make that new place a permanent home. Owens v. Chaplin, 228 NC 705, 47 SE2d 12 (1948).

The General Statutes speak directly to residency in G.S. §163-57. That statute is set out as follows:

§ 163-57. Residence defined for registration and voting.

All election officials, in determining the residence of a person offering to register or vote, shall be governed by the following rules, so far as they may apply:

1) That place shall be considered the residence of a person in which that person's habitation is fixed, and to which, whenever that person is absent, that person has the intention of returning.

   a. In the event that a person's habitation is divided by a State, county, municipal, precinct, ward, or other election district, then the location of the bedroom or usual sleeping area for that person with respect to the location of the boundary line at issue shall be controlling as the residency of that person.
   b. If the person disputes the determination of residency, the person may request a hearing before the county board of elections making the determination of residency. The procedures for notice of hearing and the conduct of the hearing shall be as provided in G.S. 163-86. The presentation of an accurate and current determination of a person's residence and the boundary line at issue by map or other means available shall constitute prima facie evidence of the geographic location of the residence of that person.
   c. In the event that a person's residence is not a traditional residence associated with real property, then the location of the usual sleeping area for that person shall be controlling as to the residency of that person. Residence shall be broadly construed to provide all persons with the opportunity to register and to vote, including stating a mailing address different from residence address.

2) A person shall not be considered to have lost that person's residence if that person leaves home and goes into another state, county, municipality, precinct, ward, or other election district of this State, for temporary purposes only, with the intention of returning.

3) A person shall not be considered to have gained a residence in any county, municipality, precinct, ward, or other election district of this State, into which that person comes for temporary purposes only, without the intention of making that county, municipality, precinct, ward, or other election district a permanent place of abode.

4) If a person removes to another state or county, municipality, precinct, ward, or other election district within this State, with the intention of making that state, county, municipality, precinct, ward, or other election district a permanent residence, that person shall be considered to have lost residence in the state, county, municipality, precinct, ward, or other election district from which that person has removed.

5) If a person removes to another state or county, municipality, precinct, ward, or other election district within this State, with the intention of remaining there an indefinite time and making that state, county, municipality, precinct, ward, or other election district that person's place of residence, that person shall be considered to have lost that person's place of residence in this State, county, municipality, precinct, ward, or other election district from which that person has removed, notwithstanding that person may entertain an intention to return at some future time.

6) If a person goes into another state, county, municipality, precinct, ward, or other election district, or into the District of Columbia, and while there exercises the right of a citizen by voting in an election, that person shall be considered to have lost residence in that State, county, municipality, precinct, ward, or other election district from which that person removed.

7) School teachers who remove to a county, municipality, precinct, ward, or other election district in this State for the purpose of teaching in the schools of that county temporarily and with the intention or expectation of returning during vacation periods to live where their parents or other relatives reside in this State and who do not have the intention of becoming residents of the county, municipality, precinct, ward, or other election district to which they have moved to teach, for purposes of registration and voting shall be considered residents of the county, municipality, precinct, ward, or other election district in which their parents or other relatives reside.

8) If a person removes to the District of Columbia or other federal territory to engage in the government service, that person shall not be considered to have lost residence in this State during the period of such service unless that person votes in the place to which the person removed, and the place at which that person resided at the time of that person's removal shall be considered and held to be the place of residence.

9) If a person removes to a county, municipality, precinct, ward, or other election district to engage in the service of the State government, that person shall not be considered to have lost residence in the county, municipality, precinct, ward, or other election district from which that person removed, unless that person votes in the place to which the person removed, and the

place at which that person resided at the time of that person's removal shall be considered and held to be the place of residence.

9a) The establishment of a secondary residence by an elected official outside the district of the elected official shall not constitute prima facie evidence of a change of residence.

10) For the purpose of voting a spouse shall be eligible to establish a separate domicile.

11) So long as a student intends to make the student's home in the community where the student is physically present for the purpose of attending school while the student is attending school and has no intent to return to the student's former home after graduation, the student may claim the college community as the student's domicile. The student need not also intend to stay in the college community beyond graduation in order to establish domicile there. This subdivision is intended to codify the case law. (19th amendt. U.S. Const.; amendt. State Const., 1920; 1901, c. 89, s. 15; Rev., s. 4316; C.S., s. 5937; Ex. Sess. 1920, c. 18, s. 1; 1933, c. 165, s. 4; 1945, c. 758, s. 7; 1955, c. 871, s. 2; 1967, c. 775, s. 1; 1981, c. 184; 1991, c. 727, s. 5.1; 1993 (Reg. Sess., 1994), c. 762, s. 22; 2001-316, s. 1; 2005-428, s. 3(b); 2006-262, s. 2.1.)

House Bill 1126, Session Law 2001-316, was ratified into law and amended G.S. §163-57 (9) and added (9a). Session Law 2005-428, § 3(b) added 1 (a) and (b) to the statute effective January 1, 2006. 1(c) of the statute was added by Session Law 2006 262 §2.1 effective August 27, 2006.

CHALLENGES TO VOTERS

An attack on the residency of a voter or candidate is handled as a challenge.

Provisions as to challenges to voters are found in Article 8 of Chapter 163 of the General Statutes. A challenge to a voter can be made in several different ways. Challenges can be made to voters on election day (GS §163-87); voters can be challenged other than on election day (GS§163-85); and challenges can be made to a voter choosing to cast an absentee ballot (GS §163-89).

The grounds for a challenge to a voter prior to election day (but no later than 25 days prior to an election) are found in GS §163-85(c), and such challenges may be made only for one or more of the following reasons:

1) That a person is not a resident of the State of North Carolina, or

2) That a person is not a resident of the county in which the person is registered, provided that no such challenge may be made if the person removed his residency and the period of removal has been less than 30 days, or

3) That a person is not a resident of the precinct in which the person is registered, provided that no such challenge may be made if the person removed his residency and the period of removal has been less than 30 days, or

4) That a person is not 18 years of age, or if the challenge is made within 60 days before a primary, that the person will not be 18 years of age by the next general election, or

5) That a person has been adjudged guilty of a felony and is ineligible to vote (G.S. 163-55(2)), or

7a) That a person is dead, or

8) That a person is not a citizen of the United States, or

9) With respect to municipal registration only, that a person is not a resident of the municipality in which the person is registered, or

10) That the person is not who he or she represents himself or herself to be.

A challenge made prior to election day requires a preliminary hearing under GS §163-85(d). If the county board finds sufficient probable cause for the charge it shall then send the matter for full hearing under the provisions of GS §163-86.

The grounds for challenging a voter on election day are those reasons listed above plus A) that the voter has already voted in that primary or election, or B) if voting in a partisan primary, the voter is registered with another political party. The procedure for a hearing for a challenge made on election day is set out in GS §163-88.

EVIDENCE AND FACTORS USED IN CONSIDERING RESIDENCY

County boards of elections may become confused over the standards of evidence they should use in hearings on matters such as residency. The NC Rules of Evidence do not have to be strictly followed. Direct and circumstantial evidence that is relevant to the issue being proved should be allowed. The issue of residency is a factual matter that can be proved by either or both direct and/or circumstantial evidence. Evidence is whatever is received by the trier of the facts to establish or disprove a fact. Direct evidence is evidence that is dependent on no other persons or things for its probative value. Such as “I saw him,” “He told me,” “I received a letter,” and “I was given.” This evidence depends upon the creditability of the witness and such real evidence that is available (“He sent me a letter and here it is”). Circumstantial evidence is indirect evidence of facts from which inferences can be made. (He was having an affair; thus he might have a motive to kill his wife. His hair was found at a place, so he was there.)

Hearsay evidence should be avoided or given less weight. Hearsay is evidence from a witness not proceeding from those witnesses’ personal knowledge, but from what he has been told. (Gary told me that Susan said that Don told her.) Hearsay can be considered as evidence, but one must be careful in its consideration and find some direct or indirect evidence to support its conclusions. A hearing decision based entirely on hearsay may not be upheld. The credibility of the witness is always in the discretion of the board. The board can choose to believe all, some, or none of what a witness says, based upon credibility (I just don’t believe him). When the board discounts the testimony of a witness, it is important that they find in the order that the witness was not credible. That is important, for legal

reviews of the board's decision will respect the county board's finding of no credibility based upon law and the fact that your board had the chance to view the witness and his demeanor.

"The determination of domicile depends upon no one fact or combination of circumstances, but upon the whole, taken together, showing a preponderance of evidence in favor of some particular place of domicile. A person's own testimony regarding his intention with respect to acquiring or retaining a domicile is not conclusive; such testimony is to be accepted with considerable reserve, even though no suspicion may be entertained of the truthfulness of the witness…Conduct is of greater evidential value than declarations. Declarations as to an intention to acquire a domicile are of slight weight when they are in conflict with the facts." Hall v. Board of Elections, 280 N.C. 600, 609 (1972)

So, if a challenged voter says it was his intent to make a new residence his permanent home, the board is free to chose to believe him or not. The testimony of a person as to his domicile is competent evidence that must be considered, but is not conclusive of the question. All of the surrounding circumstances and the conduct of the person must be taken into consideration. If there are facts to the contrary, one must consider the obvious bias of the voter in his testimony. Conduct of the challenged voter is of greater evidential value than the declarations of the voter.

The following are questions involving residency that a county board may or may not want to use. The county board members in a hearing on residency are the sole triers of fact. Remember that it is the ***totality*** of all the circumstances that should be considered, just not one factor.

1. Does the voter own or rent the claimed domicile residence? Does the voter own other real estate in the claimed county of domicile? What is the condition of the property? Has the voter devoted major expense to its upkeep or improvement? Is the residence claimed consistent with that person's wealth and lifestyle?

2. Is the person married, and if so where is that person's spouse residing? If the spouse lives in a separate residence from the questioned voter, can the voter or spouse offer an explanation? (Note that this is not illegal but can be relevant determining true residency.) If the voter is in an apparent viable marriage with children, can the voter explain living apart from his or her children?

3. If the person has school-aged children, where are they enrolled in school? If in a different county from that claimed, inquire why and whether they have been accepted by the current system as approved out of county students.

4. What is the voter's current address on his driver's license?

5. Does the voter have family residing in the claimed county of domicile? Do they own real estate?

6. Check the county tax records as to ownership of the property, length of ownership, and payment of taxes. What is the mailing address on those records of the voter?

7. Does the voter have banking accounts in the claimed county of domicile? What address is listed on those accounts?

8. Does the voter have business interests in that county? Of what nature?

9. Is the voter a member of any church or civic club in the community? Does he or she donate to that organization? How active is the voter within the church or club?

10. Does he subscribe to the local newspaper?

11. What is the address on his Federal and State tax returns? (Under penalties of perjury, it is unlawful to claim a residence on your income taxes that is not your true residence.)

12. Where are family pictures kept?

13. Is the nature of the voter's occupation such that it keeps him or her moving?

14. Does he or she have a burial plot in the alleged county of domicile?

15. Do power, natural gas, phone or internet bills support the alleged domicile?

16. Does the voter maintain motor vehicles in the county and list them for taxes in that county?

17. What is the person's history of voter registration or running for political office?

18. Does the person have pets, and where do they live?

19. How is the claimed residence insured? Is it insured as the "primary residence" in a homeowner's policy or does the voter claim another domicile as the "principal residence"?

The above questions are only a few suggestions based upon issues in reported court cases and the circumstances of maintaining a residence. Again, a county board has the sole discretion as to areas of examination and evidence to be considered.

RESIDENCY OF CANDIDATES

Residency affects the right of the voter to vote, but it is also material as to persons running for office. Article VI of the North Carolina Constitution deals with residency and the fact that it is required to be both a voter and a candidate. There are additional residency requirements for members of the General Assembly. Article II of the North Carolina Constitution requires that Senators and Representatives must have resided in their districts for at least one year immediately preceding his/her election.

This issue was discussed by the N.C. Supreme Court in Farnsworth v. Jones, 112 N.C. App 182, 187 (1994) at page 189. "Our decision is additionally supported by the underlying rationale for the 30 day domicile rule for candidate eligibility. The requirement was designed to deter abuses of the election process, such as precinct shopping, and to insure that elected officials sincerely represent the residents of a particular district."

Article 11B of Chapter 163 of the General Statutes was added by Session law 2006-155 effective January 1, 2007. It deals with how to challenge a candidacy, which could include a dispute as to that candidate's residence (GS 163-127.2 (b)). That article is set out below. Note the major differences between candidate challenges and voter challenges are highlighted in yellow.

§ 163-127.1. Definitions.

As used in this Article, the following terms mean:

Board. State Board of Elections.
Candidate. A person having filed a notice of candidacy under the appropriate statute for any elective office in this State.
Challenger. Any qualified voter registered in the same district as the office for which the candidate has filed or petitioned.
Office. The elected office for which the candidate has filed or petitioned. (S. L. 2006-155, s. 1; 2006-259, s. 48(a).)

§ 163-127.2. When and how a challenge to a candidate may be made.

a) When. – A challenge to a candidate may be filed under this Article with the board of elections receiving the notice of the candidacy or petition no later than 10 business days after the close of the filing period for notice of candidacy or petition.
b) How. – The challenge must be made in a verified affidavit by a challenger, based on reasonable suspicion or belief of the facts stated. Grounds for filing a challenge are that the candidate does not meet the constitutional or statutory qualifications for the office, including residency.
c) If Defect Discovered After Deadline, Protest Available. – If a challenger discovers one or more grounds for challenging a candidate after the deadline in subsection (a) of this section, the grounds may be the basis for a protest under G.S. 163-182.9. (S. L. 2006-155, s. 1.)

§ 163-127.3. Panel to conduct the hearing on a challenge.

Upon filing of a challenge, a panel shall hear the challenge, as follows:

(1) Single county. – If the district for the office subject to the challenge covers territory in all or part of only one county, the panel shall be the county board of elections of that county.

(2) Multicounty but less than entire State. – If the district for the office subject to the challenge contains territory in more than one county but is less than the entire State, the Board shall appoint a panel within two business days after the challenge is filed. The panel shall consist of at least one member of the county board of elections in each county in the district of the office. The panel shall have an odd number of members, no fewer than three and no more than five. In appointing members to the panel, the Board shall appoint members from each county in proportion to the relative total number of registered voters of the counties in the district for the office. If the district for the office subject to the challenge covers more than five counties, the panel shall consist of five members with at least one member from the county receiving the notice of candidacy or petition and at least one member from

the county of residency of the challenger. The Board shall, to the extent possible, appoint members affiliated with different political parties in proportion to the representation of those parties on the county boards of elections in the district for the office. The Board shall designate a chair for the panel. A meeting of the Board to appoint a panel under this subdivision shall be treated as an emergency meeting for purposes of G.S. 143-318.12.

(3) Entire State. – If the district for the office subject to the challenge consists of the entire State, the panel shall be the Board. (S. L. 2006-155, s. 1.)

§ 163-127.4. Conduct of hearing by panel.

(a) The panel conducting a hearing under this Article shall do all of the following:

(1) Within five business days after the challenge is filed, designate and announce the time of the hearing and the facility where the hearing will be held. The hearing shall be held at a location in the district reasonably convenient to the public, and shall preferably be held in the county receiving the notice of the candidacy or petition. If the district for the office covers only part of a county, the hearing shall be at a location in the county convenient to residents of the district, but need not be in the district.

(2) Allow for depositions prior to the hearing, if requested by the challenger or candidate before the time of the hearing is designated and announced.

(3) Issue subpoenas for witnesses or documents, or both, upon request of the parties or upon its own motion.

(4) Render a written decision within 20 business days after the challenge is filed and serve that written decision on the parties.

(b) Notice of Hearing. – The panel shall give notice of the hearing to the challenger, to the candidate, other candidates filing or petitioning to be elected to the same office, to the county chair of each political party in every county in the district for the office, and to those persons who have requested to be notified. Each person given notice shall also be given a copy of the challenge or a summary of its allegations.

Failure to comply with the notice requirements in this subsection shall not delay the holding of a hearing nor invalidate the results if the individuals required by this section to be notified have been notified.

(c) Conduct of Hearing. – The hearing under this Article shall be conducted as follows:

(1) The panel may allow evidence to be presented at the hearing in the form of affidavits supporting documents, or it may examine witnesses. The chair or any two members of the panel may subpoena witnesses or documents. The parties shall be allowed to issue subpoenas for witnesses or documents, or both, including a subpoena of the candidate. Each witness must be

placed under oath before testifying. The Board shall provide the wording of the oath to the panel.

(2) The panel may receive evidence at the hearing from any person with information concerning the subject of the challenge, and such presentation of evidence shall be subject to Chapter 8C of the General Statutes. The challenger shall be permitted to present evidence at the hearing, but the challenger shall not be required to testify unless subpoenaed by a party. The panel may allow evidence to be presented by a person who is present.

(3) The hearing shall be recorded by a reporter or by mechanical means, and the full record of the hearing shall be preserved by the panel until directed otherwise by the Board.

(d) Findings of Fact and Conclusions of Law by Panel. – The panel shall make a written decision on each challenge by separately stating findings of facts, conclusions of law, and an order.

(e) Rules by Board. – The Board shall adopt rules providing for adequate notice to parties, scheduling of hearings, and the timing of deliberations and issuance of decisions. (2006-155, s. 1.)

§ 163-127.5. Burden of proof.

(a) The burden of proof shall be upon the candidate, who must show by a preponderance of the evidence of the record as a whole that he or she is qualified to be a candidate for the office.

(b) If the challenge is based upon a question of residency, the candidate must show all of the following:

(1) An actual abandonment of the first domicile, coupled with an intent not to return to the first domicile.

(2) The acquisition of a new domicile by actual residence at another place.

(3) The intent of making the newer domicile a permanent domicile. (S.L. 2006-155, s. 1.)

§ 163-127.6. Appeals.

(a) Appeals from Single or Multicounty Panel. – The decision of a panel created under G.S. 163-127.3 (1) or G.S. 163-127.3(2) may be appealed as of right to the Board by any of the following:

(1) The challenger.

(2) A candidate adversely affected by the panel's decision.

Appeal must be taken within two business days after the panel serves the written decision on the parties. The written appeal must be delivered or deposited in the mail to the Board by the end of the second business day after the written decision was filed by the panel. The Board shall prescribe forms for filing appeals from a panel's decision in a challenge. The Board shall base its appellate decision on the whole record of the hearing conducted by the panel and render its opinion on an expedited basis. From the final order or decision by the Board under this subsection, appeal as of right lies directly to the

Court of Appeals. Appeal shall be filed no later than two business days after the Board files its final order or decision in its office.

(b) Appeals from Statewide Panel. – The decision of a panel created under G.S. 163-127.3(3) may be appealed as of right to the Court of Appeals by any of the following:

(1) The challenger.

(2) A candidate adversely affected by the panel's decision.

Appeal must be taken within two business days after the panel files the written decision. The written appeal must be delivered or deposited in the mail to the Court of Appeals by the end of the second business day after the written decision was filed by the panel. (S. L. 2006-155, s. 1.)